UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:19-cr-00015**

BRENDAN CHANDLER,

Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Defendant Brendan Chandler ("Defendant") is charged with one count of attempted coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b), and two counts of attempted transfer of obscene material to a minor in violation of 18 U.S.C. §1470. *See* Sup. Indict., Dkt. No. 36. He moved to suppress the statements he made to law enforcement officers on April 17, 2018, and to suppress the contents of his cellular telephone recovered by law enforcement. *See* Dkt. # 25. The government opposed the motion, *see* Dkt. # 28, and Defendant filed a reply memorandum of law. *See* Dkt. # 35. The Court held a factual hearing on July 9, 2019 at which time the parties offered witness testimony and evidence, and indicated that they stipulated to the authenticity and admissibility of each of the exhibits submitted with the motion papers and the opposition papers. *See* Dkt. #s 25-2 (Def. Ex. A); 25-3 (Def. Ex. B); 25-4 (Def. Ex. C); 28-1 (Gov. Ex. 1); 28-2 (Gov. Ex. 2); 28-3 (Gov. Ex. 3).

The following constitutes the Court's findings of fact and conclusions of law relative to the suppression motion.

II. BACKGROUND[1]

The charges arise from an undercover sting operation in which New York State Police Investigator / Federal Bureau of Investigation ("FBI") Task Force Officer John F. Montesano Jr. ("TFO Montesano") maintained an undercover profile under the name "Rachaelcheer3" on the KIK internet-based messaging application. *See* Montesano Aff. in Support of Crim. Compl., ¶ 7.[2] The undercover profile bore a photograph of a young-looking female, pictured only from the chest down. *Id.* While the picture is of an actual adult, the profile does not specify an age, or otherwise represent that the user is not a minor. *Id.*

On April 17, 2018 at approximately 9:03 a.m., a person with the profile name of "Brendan Chandler," and screen name "bchandler420," sent a direct message to Rachaelcheer3 through the KIK messenger application. *Id.*, ¶ 8. After Rachaelcheer3 indicated that she was a 14 years old female and a student at a private school, *id.* ¶ 9-10,[3] bchandler420 began a sexually explicit conversation, asking Rachelcheer3 whether she was a virgin (she responded she was not) and how many times she had had sex (she responded 3 times). *Id.* ¶ 11. Bchandler420 then sent a photograph of an erect penis and

[1]The Court does not find that the factual allegations in the Background section have been proven, but presents these allegations to provide background to the April 17, 2018 law enforcement encounter, and to provide relevant information for the ensuing search warrant application.

[2]The affidavit is attached to Gov. Ex. 3, Dkt. 28-3, pp. 28-34.

[3]Although there is no dispute that Rachelcheer3 is a fictitious identity used by TFO Montesano, the Court refers to Rachelcheer3 using female pronouns based on representations presented to bchandler420.

asked whether Rachaelcheer3 wanted to engage in sexual intercourse and other specified sexual activity. *Id.* ¶¶ 11-12. Bchandler420 then sent another photo of an erect penis, and wrote that he wanted to engage in sexual activity with Rachaelcheer3 "[a]s long as you don't get me in trouble lol." *Id.* After several more messages, including two (2) photos TFO Montesano sent bchandler420 of a fully clothed, young woman sitting in front of lockers (but no face shown), bchandler420 wrote: "Wyd after school?" meaning what are you doing after school? *Id.* ¶ 13. Bchandler420 then sent to Rachaelcheer3 a picture of a fully clothed adult male seated at the steering wheel of a car. *Id.* According to TFO Montesano, the male in the picture "appears to be the same male pictured on the driver's license issued by the New York Department of Motor Vehicles to Chandler. It is also the same person [the agents] arrested on April 17." *Id.*

Bchandler420 then indicated again that he wanted to engage in sexual activity with Rachaelcheer3, including sexual intercourse, to which Rachaelcheer3 responded: "So can u tell me what u wanna do... bc [because] ur a lot older then me and I'll be nervous. If I know ahead of time it would be better ... lol." *Id.* ¶ 14. Bchandler420 stated that he wanted to see Rachaelcheer3 later and that "I told you what I want to do." *Id.* ¶ 15. Rachaelcheer3 asked where and stated that she was 14 years old and could not drive. *Id.* Bchandler420 stated that he would pick up Rachaelcheer3 in a car. *Id.* He asked her if she wanted to engage in sexual intercourse and Rachaelcheer3 responded: "If u think I can I will ... R u·doing [going] to bring condoms ... bc [because] I don't wanna get prego [pregnant]." *Id.*

While assuming the identity of Rachaelcheer3, TFO Montesano agreed to meet bchandler420 in the vicinity of a Walmart store in Latham, New York, at 4:30 p.m. that day,

April 17, 2018. *Id.* ¶ 16. According to TFO Montesano, "Chandler arrived, alone, at the Walmart around 4:35 p.m. on April 17 and was arrested shortly thereafter, while pulling up (in his car) to a young woman (a plain-clothed State Police Officer) that, based on the circumstances, [TFO Montesano] believe[d] [Chandler] thought was Rachelcheer3." *Id.* ¶ 17.

III. FINDINGS OF FACT

Based upon the credible evidence presented on the motion and at the hearing, the following relevant facts are established.

At about 4:30 p.m. on April 17, 2018, Defendant drove his black Volkswagen automobile into the Walmart parking lot in Latham, New York, and parked in front of the store. Defendant admitted at the hearing that he was using the KIK messenger application on his cellular telephone to communicate with Rachelcheer3 while he was parked at Walmart waiting for someone he thought was named Rachel. After Defendant was parked for approximately ten minutes, FBI Special Agent Brian Seymour ("SA Seymour"), who had parked his unmarked FBI van directly behind Defendant's vehicle and was dressed in plain clothes, walked up to Defendant's driver's side window. Defendant admitted at the hearing that when he saw SA Seymour approach his vehicle, he quickly deleted the KIK application from his cellular telephone. A videotape from a Walmart surveillance video shows that at about the same time SA Seymour reached Defendant's driver's side window, an unmarked vehicle stopped in the road perpendicular to where Defendant was parked and two plain-clothed officers exited the vehicle and walked up to Defendant's vehicle. Def. Ex. B (Walmart surveillance video). A fourth plain-clothed officer is seen walking from the front of

the vehicle to the driver's side window. *Id.* The door to Defendant's vehicle was opened although it is not clear from the video or from the evidence who opened it. At about the same time, a white unmarked car pulled in front of Defendant's vehicle blocking it in, and three plain-clothed officers exited the vehicle and walked to the front of Defendant's vehicle. *Id.* SA Seymour directed Defendant to "step out" of his car and to "come on back to my car." Gov. Ex. 2 (audio tape of initial encounter). The Walmart surveillance video shows Defendant getting out of his vehicle untouched by any of the four officers standing outside the car door. Def. Ex. B. Defendant than walked with SA Seymour to the rear of Defendant's vehicle and out of the view of the surveillance video camera. *Id.* As indicated, SA Seymour's vehicle was parked behind Defendant's vehicle and the evidence indicates that this was where Defendant was ushered. Shortly after Defendant and SA Seymour walked to the rear of Defendant's vehicle and out of view of the surveillance video camera, the three other officers who were standing with SA Seymour near the driver's side door of Defendant's vehicle walked to the rear the vehicle and out of sight of the surveillance camera. *Id.* The three officers who arrived in the white vehicle that parked in front of Defendant's vehicle remained in the camera view standing in front of Defendant's vehicle. *Id.*

The evidence revealed that shortly after Defendant exited his vehicle, SA Seymour confiscated Defendant's cellular telephone. SA Seymour asked Defendant whether he had any weapons "or anything like that on you," and then conducted a pat-frisk of Defendant. Gov. Ex. 2. The Walmart surveillance video indicates that a few minutes after Defendant was ushered out of camera view, a plain-clothed officer who had been standing in front of

Defendant's vehicle got into the vehicle and drove it out of camera view. Def. Ex. B. Inasmuch as the surveillance video does not show any transfer of keys to the officer who drove Defendant's vehicle, *id.*, the Court presumes that the keys were still in the ignition.

Defendant was led to SA Seymour's police van which is equipped with video/audio recording devices focusing on the back passenger-side seat on which Defendant was directed to sit. *See* Def. Ex. A (In-Van Video Recording). SA Seymour sat in the back driver's-side seat next to Defendant, and TFO Montesano sat in the front passenger's seat directly in front of Defendant. *Id.* Once in the van, SA Seymour informed Defendant three times he was not under arrest. *Id.* at 16:51:30; 16:51:56; 16:52:31. Defendant was almost immediately told that agents wanted to speak to him, and wanted to "take a look at" his cellular telephone, because the agents received a call from a "frantic mother" with a relationship with the New York State Police complaining that her troubled daughter was communicating with someone. *Id.* at 16:52:13-16:52:20. SA Seymour told Defendant that the agents wanted to "get [Defendant's] end of the story." *Id.* SA Seymour admitted at the hearing that the reference to receiving a call from a frantic mother was not true. When Defendant denied that he had been "speaking to anyone," SA Seymour told Defendant: "You're not in handcuffs. I'm asking you to talk to us. I'm not going to compel you to talk to us. I'd like you to read this (handing Defendant an FBI Advice of Rights form that contains the *Miranda* rights)." *Id*. at 16:52:34-16:52:41. At this point, Defendant was told that his vehicle had been moved but that officers were not searching it. *Id.* at 16:52:42- 16:53:14. SA Seymour confirmed that Defendant had been arrested before. *Id.* at 16:52:48. SA Seymour then explained to Defendant: "The reason that I quickly moved you to my car is I

don't want to embarrass you in public, make you look like you were getting arrested or something like that." *Id*. at 16:53:16-16:53:23. SA Seymour confirmed that Defendant could read and write English, and told Defendant to "read what your rights are" referring to the Advice of Rights form. *Id.* at 16:53:52-16:54:10. Defendant then looked at the Advice of Rights form for a few seconds, and handed it back to SA Seymour. *Id.* at 16:53:56-16:54:02. SA Seymour reiterated that Defendant was "not obligated to speak." *Id.* at 16:54:20-16:54:30. Defendant was then allowed to exchange text messages, on his personal phone, with his girlfriend although agents told Defendant not to delete anything on the phone and took the phone back from him when he was done. *Id.* at 16:55:05-16:55:40.

SA Seymour then handed the Advice of Rights form back to Defendant and said: "This is standard [referring to the form]. It is nothing." *Id.* at 16:55:50-16:56:09. SA Seymour testified that he made these statements because he wanted Defendant to understand that the Advice of Right form was a "standard *Miranda* form," and that it did not contain any authorizations for law enforcement to take any action, that Defendant was not agreeing to anything, that Defendant was not admitting to anything, and that there was no direct correlation between signing the form and being arrested. After making the statements about the Advice of Rights form, SA Seymour asked Defendant: "Do you mind talking with us? Are you okay speaking with us?" *Id.* In response Defendant said: "Yeah, I don't...." , to which SA Seymour said words to the effect that Defendant should signify "that you read the rights and you understand that you are willing to speak with us." *Id.* at 16:56:09-16:56:15. The video shows that Defendant signed the Advice of Rights form while SA Seymour was still speaking to him. *Id.* at 16:55:51-16:56:17. Defendant held the Advice

of Rights form for several seconds before signing it.

The agents began questioning Defendant about his reason for being at Walmart and implied that they were aware that Defendant had been communicating with the frantic mother's daughter. *Id.* at 16:57:20-16:59:32. About 17 minutes into the interview while SA Seymour was asking Defendant to sign a form consenting to a search of his cellular telephone, Defendant could see that his car was being towed away. Around this occurrence, the following exchange took place:

CHANDLER:	So I'm getting arrested?
TFO MONTESANO:	Well, we're still talking.
SA SEYMOUR:	We haven't made that decision yet.
TFO MONTESANO:	Yeah it's a Motorola Droid.
CHANDLER:	But I'm not going home tonight, right?
SA SEYMOUR:	Nobody said that. Relax. Why are they towing his car? I didn't think we were doing the car. I thought we were going to wait about the car to figure out what we were doing.
CHANDLER:	Good god.
TFO MONTESANO:	No matter what we can get the car.
SA SEYMOUR:	Relax about the car.

Id. at 17:12:36-17:13:08.

The interview in the van, which lasted about 44 minutes, occurred in a normal conversational tone with no one raising their voice. *Id.* at 16:51:10-17:35:20. As the government argues, Defendant was not handcuffed during the interview, he never asked for a lawyer, he never asked to leave or to stop the interview, and agents returned Defendant's

money that had been initially taken out of his pockets. *Id.* at 17:15:29-17:15:33. However, Defendant was never verbally told that he had the right to remain silent, that if he spoke his statements could be used against him, that he was entitled to have a lawyer present, that if he could not afford a lawyer one would be appointed for him, that he could stop the interview at any time, or that he was free to leave if he desired.

IV. CONCLUSIONS OF LAW

a. Suppression of Defendant's Statements

Defendant argues that the statements he made to the police while in the van where the result of a custodial interrogation conducted without proper *Miranda* warnings. The government concedes that there was interrogation in the van, but argues that Defendant was not in custody and therefore *Miranda* warnings were not required.

Miranda warnings are required when a person is interrogated while in law enforcement custody. *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir. 2003); *see United States v. Faux*, 828 F.3d 130, 134 (2d Cir. 2016)("Statements made during a custodial interrogation are generally inadmissible unless a suspect has first been advised of his or her rights.")(*citing Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Normally, custody is established if, in light of the circumstances of an interrogation, a reasonable person in the suspect's position would have felt that he was not at liberty to terminate the interrogation and leave. *Yarborough v. Alvarado*, 541 U.S. 652, 63 (2004); *see United States v. Familetti*, 878 F.3d 53, 60 (2d Cir. 2017)("In evaluating whether the degree of a restraint is custodial, we look to whether a reasonable person in the suspect's shoes would not have felt free to leave under the circumstances.")(internal quotation marks and citation omitted).

"The test for determining custody is an objective inquiry that asks (1) 'whether a reasonable person would have thought he was free to leave the police encounter at issue' and (2) whether 'a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest.'" *Faux*, 828 F.3d at 135 (citing *United States v. Newton*, 369 F.3d 659, 672 (2d Cir. 2004)). "Although both elements are required, the second is the 'ultimate inquiry' because a 'free–to–leave inquiry reveals only whether the person questioned was seized.'" *Id.* (quoting *Newton*, 369 F.3d at 672 (internal quotation omitted)).

> An individual who understands that [his] detention is "not likely to be temporary and brief" and feels that [he] is "completely at the mercy of police" could reasonably deem [his] situation comparable to formal arrest. *Newton*, 369 F.3d at 675 (quoting [*Berkemer v. McCarty*, 468 U.S. 420, 437–38 (1984)]. Relevant considerations include: (1) "the interrogation's duration"; (2) "its location (*e.g.*, at the suspect's home, in public, in a police station, or at the border)"; (3) "whether the suspect volunteered for the interview"; (4) "whether the officers used restraints"; (5) "whether weapons were present and especially whether they were drawn"; and (6) "whether officers told the suspect he was free to leave or under suspicion." [*United States v. FNU LNU*, 653 F.3d 144, 153 (2d Cir. 2011)](internal citations and alterations omitted).

Id.

The Court finds that Defendant was in custody the entire time he was questioned in the van. While SA Seymour asked Defendant to voluntarily speak with him, the totality of the circumstances indicated that Defendant was left with little option. Law enforcement officers essentially surrounded Defendant while he sat in his car outside of the Walmart store, and, under this show of force, SA Seymour directed Defendant to get into SA Seymour's van to answer questions posed by SA Seymour and TFO Montesano. Based upon the fact that four law enforcement officers initially came to Defendant's door, three

other officers were near the front of the vehicle, and law enforcement vehicles blocked Defendant's vehicle from driving away, a reasonable person in Defendant's position would have felt he or she was being arrested and had little option but to comply with SA Seymour's direction for an interview. It also appears that Defendant left his vehicle so abruptly that he did not remove the keys from the ignition, a fact indicative of a non-consensual seizure. Moreover, before entering SA Seymour's FBI van, SA Seymour seized Defendant's cellular telephone and conducted a pat-frisk of Defendant. The seizure of the telephone and the pat-frisk is conduct a reasonable person would interpret as indicative of a formal arrest.

Once in the van, Defendant was directed to sit next to SA Seymour in the back of the van while TFO Montesano sat directly in front of Defendant. The doors on the van were closed but not locked, yet Defendant was never told he was free to leave. The positioning of the Agents in the close confines of the FBI van, as opposed to speaking to Defendant outside the van, would indicate to a reasonable person that he or she was being subjected to the control of the law enforcement officers attendant with a formal arrest.

Shortly after entering the van, Defendant became aware that law enforcement officers had moved his vehicle away from the front of the Walmart store, an action that would indicate to a reasonable person that the police had taken custody of the vehicle thereby impeding Defendant's ability to leave without first obtaining permission from the police. Furthermore, Defendant was almost immediately told that he was under suspicion for improper conduct with a minor based on the guise that an "frantic mother" with a relationship with the New York State Police had called the police about her troubled daughter's communication with an unknown person. SA Seymour and TFO Montesano

quickly gave indication that they were aware of the nature of Defendant's communications with the fictitious 14-year-old female. Even before Defendant saw his vehicle being towed away, he asked whether he was getting arrested and whether he was going home that night. These questions evidenced a concern by Defendant that his detention was not temporary and that his freedom was at the mercy of law enforcement. A reasonable person in Defendant's position would have had similar concerns.

Under the totality of the circumstances, a reasonable person in Defendant's position would not have felt free to leave during the interrogation in the van, and would have understood his or her freedom was curtailed to a degree associated with a formal arrest. Thus, the Court finds that Defendant was in law enforcement custody during the interrogation in the van, and turns to the question of whether Defendant was properly advised of his *Miranda* rights.

Once under custody but prior to interrogation, law enforcement must "reasonably convey to a suspect his rights as required by *Miranda*." *Florida v. Powell*, 559 U.S. 50, 60 (2010) (internal quotations omitted). An officer's *Miranda* warnings cannot be "confusing enough to cast serious doubt on whether [a suspect] understood his rights." *United States v. Murphy*, 703 F.3d, 182, 193 (2d Cir. 2012). The Second Circuit has explained:

> A statement made by the accused during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived *Miranda* rights when making the statement. The existence of a knowing and voluntary waiver does not, however, guarantee that all subsequent statements were voluntarily made.
>
> We look at the totality of circumstances surrounding a *Miranda* waiver and any subsequent statements to determine knowledge and voluntariness. In that context, knowing means with full awareness of the nature of the right being abandoned and the consequences of abandoning it, and voluntary means by

> deliberate choice free from intimidation, coercion, or deception. The government bears the burden of proof.

United States v. Taylor, 745 F.3d 15, 23 (2d Cir. 2014)(citations, quotation marks and brackets omitted).

Looking at the totality of the circumstances, the government has failed to meet its burden of proving that Defendant knowingly waived his *Miranda* rights. The Advice of Rights form, which contains the *Miranda* warnings, was presented to Defendant twice while in the van. The first time Defendant held the Advice of Rights form, SA Seymour continued to speak to him. Defendant held the form for a few seconds, glanced at it, and then handed it back to SA Seymour. This did not provide Defendant sufficient opportunity to read and understand the *Miranda* rights conveyed on the form.

The second time that SA Seymour handed the Advice of Rights form to Defendant, SA Seymour minimized the significance of the rights conveyed in the form by stating that the form was "standard" and "nothing." Although the Court credits SA Seymour's testimony that he intended to convey that the Advice of Rights form did not contain anything other than the well-recognized *Miranda* warnings, the Court must view Defendant's understanding of the form from the perspective of a criminal arrestee not schooled in the niceties of law enforcement practices or Fifth Amendment jurisprudence. Viewing the circumstances from this perspective, and even though Defendant had been previously arrested, neither he nor a reasonable person would have understood what SA Seymour was attempting to convey. Rather, a reasonable person in Defendant's position would have understood SA Seymour's statements as a minimization of the significance of the warnings contained in the Advice of Rights form, causing the person to refrain from thoroughly reviewing and considering the

rights that were being waived by signing the form.

Moreover, SA Seymour continued to speak with Defendant after Defendant was handed the form a second time, which distracted Defendant from thoroughly reviewing and considering the content of the warnings contained in the form. It is also significant that neither agent verbally conveyed the *Miranda* warnings to Defendant. While SA Seymour asked Defendant while he held the form the second time if he was willing to speak to the agents, Defendant equivocated before SA Seymour implied that Defendant should sign the form thereby indicating that Defendant had read and understood the Advice of Rights form. The circumstances surrounding Defendant signing the Advice of Rights form does not establish that Defendant did so with a full awareness of the nature of the rights being abandoned and the consequences of abandoning them.

Under the totality of the circumstances, Defendant did not have the opportunity to carefully review and understand the rights conveyed in the Advice of Rights form. That being the case, the Court concludes that Defendant did not knowingly waive his *Miranda* rights even though he signed the Advice of Rights form. Accordingly, Defendant's motion to suppress statements he made to the agents in the FBI van on April 17, 2018 is granted.

b. Suppression of the Contents of Defendant's Phone

Defendant also moves to suppress the contents of his cellular telephone, arguing first that the police improperly coerced him into signing a consent-to-search form for the telephone. The government responds that the search of the cellular telephone was properly authorized by a federal search warrant signed by the Hon. Christian Hummel, United States Magistrate Judge. In response to this argument, Defendant argues:

> The criminal complaint in this case was incorporated by reference to the Application for the Search Warrant. *See* Dkt. No. 28-3 at 12 ¶ 5 ("The complaint is incorporated herein by reference and attached as an exhibit to this affidavit."). Under the section entitled "basis for the probable cause finding," FBI Task Force Officer John F. Montesano Jr. attested that following the defendant's arrest "[h]e admitted to messaging Rachaelcheer3 and driving to Walmart to meet for the purposes of engaging in oral sex in his car with someone he thought was 14 years old." Dkt. No. 28-3 at 33 ¶ 18. Law enforcement used Mr. Chandler's illegally obtained admissions to establish that he was the individual communicating with the fictitious underage female. Law enforcement then employed Mr. Chandler's admissions to support its search warrant application and to establish a basis to search his cellular telephone.
>
> Prior to Mr. Chandler's admissions, law enforcement only knew that a screenname entitled "bchandler420" and the associated profile name "Brendan Chandler" had messaged the undercover profile "Rachaelcheer3" on the internet-based messaging application Kik Messenger on April 17, 2018. *See* Dkt. No. 28-3 at 30-32 ¶¶ 7-16. After discussing sexual activity, law enforcement knew that "bchandler420" arranged to meet "Rachaelcheer3" at Walmart in Albany County, New York in the afternoon of that day. *See id.* Law enforcement did not know that the defendant was the individual who had sent messages to the fictitious underage girl or that he was the individual who intended to engage in oral sex with her. It was not until Mr. Chandler was interrogated that law enforcement knew the identity of the individual communicating as "bchandler420." Mr. Chandler's illegally obtained admissions were the missing link that law enforcement needed to apply for a search warrant for the content of his cellular telephone.
>
> The Government cannot rely on the later-obtained warrant as an independent source to search Mr. Chandler's cellular telephone where a substantial basis for the warrant application was illegally-obtained evidence.

Def. Reply Mem. L. at 2-3.

Under *Wong Sun v. United States*, 371 U.S. 471, 484 (1963), all evidence that is either directly or indirectly derived from unconstitutional police conduct is tainted and is subject to suppression as "fruit of the poisonous tree." *United States v. DePonceau*, No. 05-CR-6124L, 2008 WL 222520, at *10 (W.D.N.Y. Jan. 24, 2008), *report and recommendation adopted*, 2008 WL 624110 (W.D.N.Y. Mar. 5, 2008). "The question is

'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint .'" *Id.* (quoting *Wong Sun*, 371 U.S. at 488 (internal quotation omitted). "The taint of illegally obtained evidence may be purged in one of two ways: either by showing that the evidence was also available through some independent source; or, by demonstrating that the causal link between the illegal conduct and the evidence is attenuated." *Id.* (citing *Wong Sun*, 371 U.S. at 487). "It is the government's burden to prove dissipation." *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 604 (1975)).

Under the independent source doctrine, "[w]hen an application for a search warrant includes both tainted and untainted evidence, the warrant may be upheld if the untainted evidence, standing alone, establishes probable cause." *Laaman v. United States*, 973 F.2d 107, 115 (2d Cir.1992) (collecting cases), *cert. denied*, 507 U.S. 954 (1993); *see Murray v. United States*, 487 U.S. 533, 537 (1988)("When the challenged evidence has an independent source," such evidence is not subject to the exclusionary rule because "exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.") (citing *Nix v. Williams*, 467 U.S. 431, 443 (1984)); *United States v. Marchand*, 564 F.2d 983, 993 (2d Cir.1977) ("[w]hen an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue")(citation omitted).

TFO Montesano's affidavit in support of the search warrant indicates in pertinent

part:

> 6. The Subject Phone was seized from Chandler incident to his arrest, and is in the possession of the FBI Albany Field Office. . . .
>
> 7. There is probable cause to conclude that the Subject Phone will contain evidence of violations of Title 18, United States Code, Section 2422(b). This is the only phone that Chandler possessed at the time of his arrest. This phone must necessarily be the phone he used to communicate with rachaelcheer3, because he was communicating with her as he drove into the Walmart parking lot in an attempt to meet her. . . .

Montesano Aff., ¶¶ 6-7.

The affidavit also indicates, as Defendant points out, that "[t]he [criminal] complaint is incorporated herein by reference and attached as an exhibit to this affidavit." While the criminal complaint references Defendant's admission in the FBI van on April 17, 2018, it also indicates that during the KIK chat session bchandler420 sent a picture of an individual sitting behind a steering wheel in a car. The affidavit indicates that this picture resembles Defendant's DMV drivers license, and resembles Defendant who was arrested in the Walmart parking lot on April 17, 2018. Moreover, the criminal complaint indicates that bchandler420 was communicating with the undercover officer as Defendant drove into the Walmart parking lot, which occurred immediately before Defendant was approached by law enforcement officers and his cellular telephone was seized. The combination of these facts establishes, independent of Defendant's tainted admission in the van, that probable cause existed to conclude that bchandler420 is Defendant, and that he used his cellular telephone to communicate with Rachaelcheer3 immediately before he was apprehended in the Walmart parking lot. These facts provide probable cause to conclude that Defendant's cellular telephone contained evidence of the crimes charged in this matter thereby providing

a sufficient basis for the search warrant. Accordingly, Defendant's motion to suppress the contents of his cellular telephone is denied.

V. CONCLUSION

For the reasons discussed above, Defendant's motion to suppress the statements he made to law enforcement officers on April 17, 2018, and to suppress the contents of his cellular telephone recovered by law enforcement, Dkt. # 25, is **GRANTED in part** and **DENIED in part**. The motion is granted to the extent Defendant seeks to suppress the statements he made to law enforcement officers while being interrogated in an FBI van in the Walmart parking lot in Latham, New York on April 17, 2018. The motion is denied to the extent Defendant seeks to suppress the contents of his cellular telephone recovered by law enforcement pursuant to a federal search warrant.

IT IS SO ORDERED.

Dated: July 12, 2019

Thomas J. McAvoy
Senior, U.S. District Judge